Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

LEO A. DAMMER,

Petitioner,

vs.

MERCEDES-BENZ OF NORTH AMERICA, INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a plaintiff alleging a discriminatory discharge under the Age Discrimination in Employment Act (ADEA) must point to evidence of a replacement to satisfy the fourth prong of the McDonnell-Douglas model or may inferences of discrimination be drawn from past age animus prior to the termination which can be tied to the discriminatory discharge to satisfy the requirements for a *prima facie* case.

2. Whether a plaintiff alleging a discriminatory discharge under the ADEA during a downsizing has been "constructively replaced" as a matter of law if his duties have been distributed to younger less qualified employees and, if so, whether such "constructive replacement" would satisfy the fourth prong of the McDonnell-Douglas *prima facie* case when replacement is the issue.

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STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on February 1, 1996. The court declined a Petition for Rehearing in Banc March 11, 1996. App. 1a-2a. The Order Implementing Mandate was entered April 15, 1996. App. 13a-14a. This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Third Circuit by Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, *et seq.*, provides in part:

Section 621(b):

> [T]o promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment . . .

Section 623(a)(1):

> [I]t shall be unlawful for an employer to . . . discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment because of such individual's age.

STATEMENT OF THE CASE

On April 3, 1972, petitioner became employed by respondent Mercedes-Benz of North America, Inc. ("Mercedes") in the import parts department. On September 4, 1991 after 19 and 1/2 years of service, the petitioner at age 56 was terminated from his employment during a reduction-in-force. Petitioner's position of Parts Import Supervisor was eliminated and his duties were assigned to others in the department. Petitioner was a well qualified employee and received merit raises throughout his career. The only reason given by Mercedes for petitioner's termination was the reduction-in-force (RIF) brought on by a downturn in new car sales. The Import Parts Department provided imported parts for all years of automobiles. Ernst Ruppert (Ruppert), the General Manager who was also in charge of petitioner's department made the decision to terminate petitioner.

On August 1, 1990, about a year prior to the downsizing, Mercedes offered a Voluntary Retirement Program to older workers who qualified only because of their age of 55 or over as an incentive to retire effective January 1, 1991. There was no mention or even a rumor of any possible RIF. Mercedes allowed employees three months until October 31, 1990 to consider whether to accept this incentive to retire. Several weeks before the October 31st deadline, petitioner was approached more than

once by his superior Erich Lenz (Lenz) to learn of petitioner's intentions about retiring. When petitioner inquired as to why he was being asked before the October 31st deadline, Lenz replied that Manager Ruppert was "after me" to find out.

Between August 1990 and late October 1990, contemporaneously with the offer of early retirement to petitioner, Ruppert, the decisionmaker who terminated petitioner, was in the process of making arrangements to hire Kay-Wohl Ahlden (Ahlden), a 28-year old male from Germany. Ahlden worked in the shipment of spare parts in Germany. As indicated, the negotiations to hire Ahlden were going on at the time that Ruppert was pressuring another employee to find out petitioner's intention about retiring. Mercedes did not provide any paper trail relating to Ahlden's pre-employment discussions and meetings.

When petitioner announced to Manager Ruppert that he decided not to accept early retirement, Ruppert (seated at his desk) did not even look up at petitioner. Ruppert merely stated "[t]hat's your decision . . . that's your decision." Immediately after petitioner refused the early retirement incentive, Manager Ruppert began to ignore petitioner and was "treating me [petitioner] like I wasn't even there." Other times Ruppert belittled petitioner and subjected him to unfounded criticism.

Mercedes-Benz of North America officially hired Ahlden on April 1, 1991. Ahlden was the 28-year old male (half petitioner's age) who, as indicated above, had been recruited at the same time when early retirement was offered to petitioner. Thereafter, Manager Ruppert included Ahlden but began to exclude petitioner from important meetings, thus depriving petitioner of crucial information relating to the performance of his duties . By July 1991, about two months before petitioner's termination, Ruppert was dealing almost exclusively with Ahlden in matters concerning petitioner's department and staff.

After Ahlden was hired and continuously thereafter, Ahlden would appear in petitioner's Import Parts Department and without consulting petitioner would give orders to petitioner's staff. Ruppert, without even telling petitioner, had also assigned to Ahlden petitioner's very important duty of visiting the different locations around the country where parts were imported. The main core of petitioner's duties had now been taken over by Ahlden. Petitioner complained to management about what was happening to his job. Petitioner related to management how Ahlden undermined petitioner's authority in front of his staff and how Ahlden had taken over petitioner's important duties. Petitioner felt that all this was done to "ease me out" of employment.

Documents prove Ruppert finalized plans in writing in July 25, 1991 to terminate petitioner.[1] On September 4, 1991, Mercedes-Benz terminated petitioner.

Besides the 28-year old Ahlden who was given the main core of petitioner's duties, just prior to petitioner's termination, at least one younger employee was hired in the Import Parts Department. After the downsizing, younger employees who were less qualified than petitioner were retained in the department. These younger employees were given the remains of petitioner's duties, the main core having already been assigned to Ahlden. Petitioner was given no option whatsoever to remain at Mercedes despite the fact his duties remained.

On November 21, 1991, petitioner filed an age disparate treatment charge under the ADEA with the Equal Employment Opportunity Commission (EEOC). Mercedes provided

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1. The District Court's finding that "the company . . . did not decide to eliminate plaintiff's position until one week prior to the implementation of the RIF" is in error. (App. 17a).

misleading information concerning Ahlden's employment status to the EEOC. In a computer print-out of respondent's employees provided to the EEOC, Ahlden was listed as a permanent employee of Mercedes-Benz of North America hired in September 1985,[2] over fiv years before his true hiring date of April 1,1991. In its determination, the EEOC did not address petitioner's concerns regarding Ahlden who took over petitioner's main duties. App. 29a-31a.

On July 18, 1992, after receiving the "right to sue" letter dated May 8, 1992 from the EEOC, petitioner filed a complaint as *pro se* claiming age discrimination under the ADEA against Mercedes-Benz in the United States District Court. Thereafter, petitioner retained counsel and the complaint was amended to include retaliation and state claims. The District Court had subject matter jurisdiction pursuant to 29 U.S.C. § 626, *et seq.*, 28 U.S.C. § 1331 and pendent jurisdiction.

In District Court, Mercedes modified Ahlden's employment status by classifying him as a 3-year contract, temporary employee. However, Ahlden's personnel records list Ahlden as a permanent employee and a new hire as of April 1, 1991. In fact, Ahlden was promoted and was still employed in 1995 when the Circuit Court appeal was filed, 4 years later. Mercedes created the Logistics Analyst position for Ahlden in 1991 when Ahlden was hired.

The District Court first ruled that it "does not believe that

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2. Ahlden had worked for Mercedes-Benz in Germany for five years since 1985 but the EEOC requested information about the employees of Mercedes-Benz of North America, Inc. and date of hire. The EEOC may have been left with the impression that Ahlden had been working in New Jersey since 1985 and, thus, did not consider Ahlden's role in petitioner's termination. Later in court documents, respondent listed April 1, 1991 as Ahlden's hiring date.

plaintiff has established a *prima facie* case" because (1) it "was not clear whether he [petitioner] was replaced with someone not in the protected class" and (2) "plaintiff has not sufficiently demonstrated that Mr. Ahlden was hired to replace him" specifically as Parts Import Supervisor. The district judge did find that Ahlden had assumed some of petitioner's former duties prior to the downsizing and that after the downsizing other employees as well assumed petitioner's remaining duties. (App. 23a). The District Court focused solely on job replacement as the a requirement to satisfy the fourth prong of the McDonnell-Douglas *prima facie* case.

The District Court continued with its analysis and ruled that petitioner did not prove intent to discriminate even if he had established a *prima facie* case. During oral argument held on March 27, 1995, the District Court judge opined that Hicks regrettably " blurs the distinction between proof of pretext and an . . . indirect proof of discrimination versus proof by direct evidence." Although petitioner's case was based solely on circumstantial evidence, the District Court focused on the stray remark introduced by Mercedes of "age before beauty." Petitioner did not introduce any direct evidence to support his case, only circumstantial. This stray remark was elicited during petitioner's deposition and perpetuated throughout the proceedings only by Mercedes. (App. 23a-24a). On April 6, 1995, the District Court granted summary judgment to Mercedes-Benz on the federal and state claims.

On appeal, the Third Circuit panel affirmed. First, the panel found that petitioner did not establish a *prima facie* case of age discrimination because petitioner had not demonstrated any new employee was hired to replace him. The Circuit Court did find that " a younger man assumed some of Dammer's [petitioner's] former duties, but he did not take over the job of Parts Import Supervisor." The Circuit Court found that "other employees in

the department assumed some of Dammer's [petitioner's] former responsibilities [because] the Parts Import Supervisor position was eliminated and consolidated." (App. 6a).

The Circuit Court held that even if petitioner had established a *prima facie* case of age discrimination, he nevertheless did not sustain his burden to overcome respondent's reason of a RIF for the termination. As did the District Court, the Circuit Court also focused on the stray remark "age before beauty" provided by the Mercedes as if this were petitioner's proffer of direct evidence of discrimination when, in fact, petitioner's case was presented as purely circumstantial. The petition for rehearing in banc was denied on March 11, 1996.

REASON FOR GRANTING THE WRIT

This writ of certiorari should be granted because there is a definite conflict among the Circuits concerning the evidence that is needed to establish a *prima facie* case under the ADEA especially in reduction-in-force cases. The guidance of this Court on this issue is crucial to insure that older qualified employees who have suffered discrimination "because of their age" will be properly served by our justice system. Only then can we even hope to eradicate age discrimination in the workplace.

I.

WHETHER A PLAINTIFF ALLEGING A DISCRIMINATORY DISCHARGE UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA) MUST POINT TO EVIDENCE OF A REPLACEMENT TO SATISFY THE FOURTH PRONG OF THE McDONNELL-DOUGLAS MODEL OR MAY INFERENCES OF DISCRIMINATION BE DRAWN FROM PAST AGE ANIMUS PRIOR TO THE TERMINATION WHICH CAN BE TIED TO THE DISCRIMINATORY DISCHARGE TO SATISFY THE REQUIREMENTS FOR A *PRIMA FACIE* CASE.

The Third Circuit is in conflict with other Circuits with respect to what is necessary to satisfy the requirements for a *prima facie* case in ADEA cases. Using the mechanical application of the McDonnell-Douglas model, the Third Circuit held that petitioner did not meet the requirements of the fourth element of the a *prima facie* case because he "has not demonstrated any new employee was hired to replace him." The Circuit Court in passing without analysis also concluded that petitioner did not show that others not in the protected class were treated more favorably although, in fact, these employees took over petitioner's duties. (App. 6a).

In its strict mechanical application of the McDonnell-Douglas model, the Third Circuit discounted the hostile environment to which petitioner was subjected beginning immediately after petitioner refused the early retirement package; the fact this decisionmaker was making plans to hire a 28 year-old at the same time the petitioner was being offered the early retirement incentive; the fact that petitioner was approached more than once weeks before the deadline concerning his retirement; the fact that the younger new

employee took over the main duties of petitioner prior to the termination; the fact that there was not a total elimination of his job and, *inter alia*, the inconsistent explanations by Mercedes involving the employment status of this new young employee who took over petitioner's main duties. (App. 4a-5a). Each action standing alone may not be troublesome but clearly the cumulative effect could be viewed as sufficient evidence from which an inference of age discrimination could be drawn to satisfy the requirements for at least a *prima facie* case.

In *Graefenhain v. Pabst Brewing Co.*, 827 F.2d 13 (7th Cir. 1987), the Seventh Circuit citing *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. at 711, 716, stressed

> When a plaintiff uses the indirect method of proof, no one piece of evidence need support a finding of age discrimination. "There will seldom be 'eye witness' testimony as to the employer's mental processes." As a result, plaintiffs have great difficulty in gathering information and often can present only circumstantial evidence of discriminatory motives. Therefore, to require, as did the district court, below that each piece of circumstantial evidence "standing alone" be sufficient to support a finding of age discrimination is to render meaningless the indirect method of proof and invite the pretexts that can render the ADEA a nullity.

In *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 358 (1977), this Court held that a *prima facie* case requires "evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act." When or where this evidence surfaced

should be irrelevant in establishing a *prima facie* case of age discrimination.

This Court has clearly stated that the McDonnell-Douglas *prima facie* case model is flexible and is "a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." The model must not be used in a "rigid, mechanized, or ritualistic" way. *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 575-77 (1978).

The Seventh Circuit in *Mathewson v. National Automatic Tool Company, Inc.*, 807 F.2d 87, 91 (7th Cir. 1986) noted that "it is well settled that evidence of earlier discriminatory conduct by an employer . . . is nevertheless entirely appropriate evidence to help prove a timely claim based on subsequent discrimination.

The Second Circuit in *Montana v. First Federal S& L of Rochester*, 869 F.2d 100,103-4 (2nd Cir. 1989) rejected First Federal's contention that in a reduction-in-force case plaintiff must show that she was replaced by a newly hired employee as the Third Count contends. The Second Circuit reinforced the proposition that the McDonnell-Douglas model is not inflexible and "is not necessarily applicable in every respect to differing factual situations." *McDonnell Douglas v. Green*, 411 U.S. 792, 802 n.13 (1973).

Reduction-in force and/or corporate reorganizations have a greater impact on older workers. Discharged older employees during such downsizing who have *bona fide* claims have a difficult time in court especially if the employee must point to a replacement. Our courts must see to it that employers are not allowed to use even a legitimate downsizing as a smoke screen for age discrimination.

II.

WHETHER A PLAINTIFF ALLEGING A DISCRIMINATORY DISCHARGE UNDER THE ADEA DURING A DOWNSIZING HAS BEEN "CONSTRUCTIVELY REPLACED" AS A MATTER OF LAW IF HIS DUTIES HAVE BEEN DISTRIBUTED TO YOUNGER LESS QUALIFIED EMPLOYEES AND, IF SO, WHETHER SUCH "CONSTRUCTIVE REPLACEMENT" WOULD SATISFY THE REPLACEMENT ELEMENT IN THE FOURTH PRONG OF THE McDONNELL-DOUGLAS *PRIMA FACIE* CASE.

The Third Circuit observed but did not give any weight to the fact that petitioner's duties at the time of the reduction-in-force were assumed by other younger workers who remained in the department. (App. 6a). In contrast, in *Montana v. First Federal S& L of Rochester*, 869 F.2d 100, 105-6 (2nd Cir. 1989), a case on point, the Second Circuit overturned summary judgment in a reduction-in-force case because in part the discharged employee's responsibilities were reassigned to younger employees and no options were given to the discharged employee.

The Fifth Circuit in *Thornbrough v. Columbus and Greenville R. Co.*, 760 F.2d 633 (5th Cir. 1985) reversed the granting of summary judgment in a reduction-in-force case. In *Thornbrough*, the Circuit Court stated that it is not the discharge itself alone that creates an inference of discrimination but rather the discharge coupled with the retention of younger employees.

The need for uniformity in the federal courts in determining what constitutes a *prima facie* case in reduction-in force cases is of utmost importance especially in these times when downsizing has become almost fashionable.

CONCLUSION

For the reasons set forth herein, petitioner Leo Dammer respectfully requests that the writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A — SUR PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED MARCH 11, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-5281

LEO A. DAMMER

v.

MERCEDES - BENZ OF NORTH AMERICA, INC.

LEO DAMMER,

Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 92-02891)

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, *Chief Judge*, and BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, MCKEE, SAROKIN, and LAY,* *Circuit Judges*

The petition for rehearing filed by the appellant, Leo A. Dammer, in the above captioned matter having been submitted

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* Honorable Donald P. Lay, Senior Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

to the judges who participated in the decision of this court and to all the other available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT:
s/ Morton A. Greenberg
Circuit Judge

DATED: MAR 11 1996

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED FEBRUARY 1, 1996

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

95-5281

LEO A. DAMMER,

v.

MERCEDES - BENZ OF NORTH AMERICA, INC.

LEO DAMMER,

Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civ. No. 92-02891)
District Judge: Honorable John W. Bissell

Submitted under Third Circuit LAR 34.1(a)
February 1, 1996

BEFORE: GREENBERG, NYGAARD, and LAY*, *Circuit Judges*
(Filed: FEB 01 1996)

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* Honorable Donald P. Lay, Senior Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

Appendix B

MEMORANDUM OPINION OF THE COURT

LAY, *Circuit Judge.*

Leo Dammer brought this action alleging, inter alia, age discrimination in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq*, and New Jersey's Law Against Discrimination, N.J. Rev. Stat. § 10:5-1 *et seq* (1992). Dammer now appeals from the district court's order of summary judgment entered in favor of his former employer, Mercedes Benz of North America, Inc. (MBNA).

Background

Dammer was employed by MBNA from April 3, 1972 through September 4, 1991. He was a Parts Import Supervisor. He was 56 years of age when he was discharged. On the date of his termination, MBNA instituted a company-wide reduction-in-force, because of a 42% drop in sales in the preceding five years. Based upon anticipated business needs, many jobs were eliminated or consolidated during the reduction-in-force. Two positions within Dammer's department were eliminated, that of Parts Import Supervisor and one of the import clerk positions.[1] The duties of each position were absorbed by other employees within the department. Company wide, the reduction-in-force resulted in the lay-offs of seventy-four employees, thirty-three of whom were over the age of forty, and forty-one of whom were under the age of forty.

Over one year before the reduction-in-force, which

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1. Two positions which were vacant during the reorganization of the Import Department were also eliminated during the reduction-in force. Def.'s Br. at 24.

occurred in September 1991, MBNA offered a voluntary early retirement package to employees 55 years of age or older who had worked for MBNA for at least 10 years. Employees who were offered the package, including Dammer, had until October 31, 1990 to decide whether they would take early retirement. Dammer declined, and alleges that during this period, he was approached by his supervisor who wanted to know if Dammer had made his decision. From this, Dammer alleges that MBNA wanted to force him out because of his age, although he stated no one attempted to influence his decision or made him believe he would be forced out in the event he declined the package. He heard nothing from his supervisors that led him to believe they were trying to get rid of him, except an isolated comment made by Mr. Ruppert, a supervisor, who once said to Dammer, "age before beauty."

Dammer contends that he was then ignored by his supervisors and his duties were taken over by a younger employee. Dammer asserts that immediately prior to the reduction-in-force, MBNA hired three new employees to replace workers who had opted for early retirement. MBNA asserts that none of these employees were hired to replace Dammer, that they were not similarly situated to Dammer, and that all of Dammer's duties were not assumed.

Dammer filed this action in the United States District Court for the District of New Jersey, alleging age discrimination, violation of public policy by retaliating against him after he decided not to accept MBNA's early retirement offer, and breach of duty of good faith by MBNA for failing to follow alleged procedures in its employee handbook giving him preferential treatment for available positions within MBNA. On April 6, 1995, the district court granted MBNA's motion for summary

judgment on Dammer's claims, finding no genuine issue of material fact existed, and that MBNA was entitled to judgment as a matter of law. Dammer timely appeals.

Age Discrimination

The framework of evidentiary burdens in ADEA actions is now well settled. Dammer must first establish a prima facie case of discrimination. In the absence of direct evidence, a plaintiff may establish a prima facie case by demonstrating by a preponderance of the evidence that he or she (1) belongs to a protected class, i.e., is at least 40 years of age; (2) was qualified for the position; (3) was dismissed despite being qualified; and (4) ultimately was replaced by a person sufficiently younger to permit an inference of age discrimination. *Miller v. Beneficial Management Corp.*, 977 F.2d 834, 846 (3d Cir. 1992). A prima facie case creates an inference of unlawful discrimination, and places upon the defendant the burden of producing a legitimate, non-discriminatory reason for the adverse employment decision. *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2747 (1993).

The district court held Dammer did not establish a prima facie case of age discrimination. We agree. Dammer has not demonstrated any new employee was hired to replace him. A younger man assumed some of Dammer's former duties, but he did not take over the job of Parts Import Supervisor. Additionally, other employees in the department assumed some of Dammer's former responsibilities as the Parts Import Supervisor position was eliminated and consolidated. Indeed, Dammer himself conceded that his job duties were absorbed by the remaining staff. Def.'s App. at 21.

Appendix B

MBNA produced evidence showing over half of the employees discharged during the reduction-in-force were under the age of 40. Moreover, in Dammer's department, he was the only employee within the protected class whose position was eliminated due to the reduction-in-force. The other position which was eliminated, an import clerk's position, was held by an employee under the age of forty. Another import clerk who was fifty-three, within the protected class, was retained. Thus, Dammer has not shown others who were not in the protected class were treated more favorably. The district court properly held that, as a matter of law, Dammer could not establish a prima facie case of age discrimination.

Pretext

Assuming Dammer had established a prima facie case of age discrimination, the burden would then shift to MBNA to show a legitimate, non-discriminatory reason for Dammer's termination. MBNA does not need to prove that it relied upon the non-discriminatory reason to rebut the prima facie presumption, but only needs to show that such a reason existed. *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2748 (1993). Once MBNA demonstrates a legitimate business purpose, Dammer bears the burden of proving MBNA's proffered reason for termination was merely a pretext for discrimination. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 257 (1981). Pretext may be proven through direct or circumstantial evidence attacking the credibility of MBNA's reason. *Billet*, 940 F.2d at 816. In this case, MBNA points to the reduction-in-force and elimination of Dammer's position in the MBNA structure. This demonstrates a sufficient non-discriminatory reason. *Palochko v. Manville Corp.*, 21 F.3d 981, 982 (10th Cir. 1994). While Dammer points to circumstances which he believes evidence an

intent on the part of MBNA to discriminate against him, we hold he has not sustained his burden to defeat the motion for summary judgment. The single comment of "age before beauty" does not demonstrate direct evidence of a discriminatory motive. *See Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509, 545 (3d Cir. 1992); *see also Guthrie v. Tifco Indus.*, 941 F.2d 374, 379 (5th Cir. 1991) (statements by former supervisor that plaintiff would "need to surround himself with people his age" nothing more than stray remarks), *cert. denied*, 503 U.S. 908 (1992). Mr. Ruppert, who like Dammer was from Germany, is approximately the same age as Dammer. Nothing in the record indicates anything but two middle-aged men bantering over seniority. *Mullen v. New Jersey Steel Corp.*, 733 F. Supp. 1534, 1551 (D.N.J. 1990). Moreover, there is evidence in the record that the comment was an English translation of a German expression of respect.[2] Since Dammer cannot show MBNA's decision to eliminate his position during the reduction-in-force was merely a pretext for unlawful age discrimination, the district court correctly granted summary judgment in favor of MBNA.

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2. In deposition, Dammer testified:

> [H]e made numerous remarks that I was much more experienced and he always held the door open when we went together, he said age before beauty, you know, even though he had — by ranks [sic] he had more stripes than I had and it was generally known there was nobody — there is nobody older right now except — when I said nobody, except even Angelino is older, but he is a quiet guy.

Def.'s App. at 30.

Appendix B

Violation of Public Policy

Dammer next contends that MBNA violated public policy by retaliating against him after he decided not to accept its offer of early retirement. Specifically, Dammer claims that after his decision, MBNA ignored him and subjected him to demeaning and stressful treatment, allegedly in violation of public policy.

A limited cause of action exists for wrongful discharge where an employee is terminated for conduct which is protected by public policy. *Pierce v. Ortho Pharmaceutical Corp.*, 417 A.2d 505, 512 (N.J. 1980). A plaintiff must identify such public policy, however, for this action to arise. There exists a strong public policy against age discrimination. As we have said, however, there is nothing in the record, other than Dammer's bald assertions, to demonstrate or create an inference that he was a victim of discrimination or retaliation. Dammer was terminated as part of a reduction in force. There is no strong public policy which encourages job security in the face of such restructuring. *See Brunner v. Abex Corp.*, 661 F. Supp. 1351 (D.N.J. 1986). Furthermore, a *Pierce* claim is limited to cases where a statute does not address the same right alleged to reflect public policy. *See Blum v. Witco Chem. Corp.*, 829 F.2d 367, 376-77 (3d Cir. 1987). Both the ADEA and NJLAD address that very same right. A *Pierce* claim will not also lie for alleged age discrimination. We affirm the district court's grant of summary judgment on Dammer's public policy claim.

Breach of Duty of Good Faith

Finally, Dammer claims MBNA breached its duty of good faith by failing to follow procedures in its employee handbook granting him "preferential treatment" regarding available jobs.

Appendix B

The employee handbook sets forth posting procedures for available jobs. There is an exception, however, to the posting procedure, for employees whose positions may have been eliminated due to reorganization. The handbook states "[t]he posting process can be suspended to allow these employees to interview for available openings provided they meet the minimum position qualifications." Def.'s App. at 100.

At the time of the reduction-in-force, however, there were no available positions. *Dammer v. Mercedes-Benz*, No. 92-2891, at 13 (D.N.J. April 6, 1995). Prior to Dammer's termination, there were two open clerk positions, but they, along with Dammer's position and that of another clerk, were eliminated from the Import Department altogether. Moreover, the handbook contains a disclaimer the district court found to be effective as a matter of law. *See Nicosia v. Wakefern Food Corp.*, 643 A.2d 554, 560 (N.J. 1994) (conspicuousness of a disclaimer suitable for judgment as a matter of law). Thus, summary judgment on Dammer's handbook claim was proper.

The judgment of the district court will be affirmed.

TO THE CLERK:

Please file the foregoing memorandum opinion.

s/ Donald P. Lay
Circuit Judge

DATED:

APPENDIX C — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED FEBRUARY 1, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

95-5281

LEO A. DAMMER,

v.

MERCEDES - BENZ OF NORTH AMERICA, INC.

LEO DAMMER,

Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civ. No. 92-02891)

BEFORE: GREENBERG, NYGAARD, and LAY,* *Circuit Judges*

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the District of New Jersey and was submitted under Third Circuit LAR 34.1(a) on February 1, 1996.

On consideration whereof, it is now here ADJUDGED and ORDERED by this court that the order of April 6, 1995, be and is hereby affirmed.

---

* Honorable Donald P. Lay, Senior Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

Appendix C

Costs taxed against appellant.

ATTEST:
s/ P. Douglas Sisk
Clerk

DATED: FEB 01 1996

APPENDIX D — ORDER IMPLEMENTING MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT ENTERED APRIL 15, 1996

HANNOCH WEISMAN
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ATTORNEYS FOR DEFENDANT/APPELLEE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. CIV 92-2891 (JWB)

LEO A. DAMMER,

Plaintiff,

v.

MERCEDES-BENZ OF NORTH AMERICA, INC.,

Defendant.

ORDER IMPLEMENTING MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

For the reasons set forth in the opinion of the United States Court of Appeals for the Third Circuit, and as set forth in the Judgment of that Court dated February 1, 1996,

Appendix D

IT IS on this 12th day of April, 1996

ORDERED that the this Court's Order of April 6, 1996 [sic] be and is hereby affirmed and that defendant's motion for summary judgment be and is hereby granted, and plaintiff's complaint is dismissed in it's entirety; and it is further

ORDERED that the costs of appeal be taxed against plaintiff, Leo A. Dammer;

s/ John W. Bissell
United States District Judge

APPENDIX E — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED APRIL 6, 1995

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT NEW JERSEY

Civil Action No. 92-2891

LEO A. DAMMER

Plaintiff,

v.

MERCEDES-BENZ OF NORTH AMERICA, INC.,

Defendant.

OPINION

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Appendix E

BISSELL, District Judge

This matter comes before the Court on defendant Mercedes-Benz of North America, Inc.'s ("Mercedes") motion for summary judgment. On or about December 26, 1991, plaintiff Leo A. Dammer filed a charge of age discrimination against defendant with the Division on Civil Rights of New Jersey ("CRD") and the Equal Employment Opportunity Commission ("EEOC"). The EEOC issued plaintiff a right to sue letter on May 8, 1992. (Freeman Cert., Exh. A). On July 20, 1992, plaintiff filed the underlying action. This Court has jurisdiction under 28 U.S.C. § 1331.

FACTS AND BACKGROUND

Plaintiff Leo A. Dammer was employed by defendant Mercedes-Benz from April 3, 1972 through September 4, 1991. (Dammer Dep. at 51). His position was that of Parts Import Supervisor. He was 56 years of age when he was terminated.

On the date of plaintiff's termination, defendant instituted a company-wide reduction-in-force ("RIF"). The RIF was implemented because of the change in economic conditions at Mercedes. (*Id.*) Between 1986 and 1991, Mercedes' sales dropped approximately 42%. (Gilson Cert., ¶ 6). Many jobs were eliminated or consolidated. (Dripchak Cert., Exh. A, ¶¶ 3, 5).

Two positions within plaintiff's department were eliminated, that of Parts Import Supervisor and one import clerk position. (Ruppert Cert., ¶ 6). The duties of each position were absorbed by other employees within the department. (*Id.*, ¶ 7). Defendant maintains that these positions were eliminated and that both employees who were terminated were not replaced.

(*Id.*, ¶8). It disputes plaintiff's allegation that he was replaced by a younger employee. The RIF resulted in the lay-offs of 74 employees, 33 who were over the age of 40 and 41 who were under the age of 40. (Freeman Cert., Right to Sue Letter attached as Exh. A).

Prior to the RIF, defendant offered an early retirement package to employees 55 years of age and older and who had worked for Mercedes for at least 10 years. (Defendant's Br. at 4). These employees had three months to consider the package. (*Id.*) Plaintiff was one of the employees offered early retirement. (Plaintiff's Br. at 4). None of the employees had knowledge of a possible RIF during the period of consideration. (*Id.*)

Plaintiff claims that during this period, he was approached by his supervisor who wanted to know if he had made his decision. (Dammer Dep. at 76-77). He alleges that from this arises an inference that defendant wanted to force him out because of his age. (*Id.* at 71, 74). However, he has also stated that no one attempted to influence his decision or made him believe that he would be forced out in the event that he chose to decline the package. (*Id.*, at 117, 150-52). He adds that he heard nothing from his supervisors that led him to believe they were trying to get rid of him. (*Id.*) Defendant maintains that, at the time the package was offered to eligible employees, the company had not decided which positions would be affected by the RIF and in fact did not decide to eliminate plaintiff's position until one week prior to the implementation of the RIF. (Freeman Cert., Exh. C at 39-40; Exh. D at 38, 42)

Plaintiff claims that after he declined the package, he got a "strange feeling" and was ignored by his supervisors. (Dammer Dep. at 124, 140). He asserts that at this time, his duties were

taken over by Mr. Ahlden, a 28-year-old employee from Germany. (*Id.* at 138, 140). Mr. Ahlden allegedly "came into plaintiff's department and in essence took over." (Plaintiff's Br. at 6). Plaintiff claims that the decision for Mr. Ahlden to "take over" was made while plaintiff was considering the early retirement package which evidences an intent of defendant to replace him because of his age. (Velantzas-Austin Cert., Exh. G).

In furtherance of his claim, plaintiff asserts that immediately prior to the RIF, defendant hired three new employees. (Dammer Dep. at 168-72). However, one of the new hires was within the protected class, the two others were hired to replace workers who had opted for early retirement and none were hired to replace plaintiff. (*Id.*) In addition, defendant asserts that Mr. Ahlden was not hired to replace plaintiff, that he was not similarly situated to plaintiff as he is a temporary employee who is an expatriate from Germany and that he did not assume all of plaintiff's duties. (Ahlden Dep. at 22-23). Furthermore, defendant claims that Mr. Ahlden replaced Mr. Lenz, plaintiff's supervisor, who was terminated for poor performance. (*Id.*)

The only direct statement that plaintiff claims demonstrates an intent to discriminate against him because of his age was from Mr. Ruppert, a supervisor, who once said to plaintiff, "age before beauty." (Dammer Dep. at 190-92). Mr. Ruppert was born and raised in Germany. Plaintiff adds that he was impliedly entitled to preferential treatment in obtaining another position once his position was eliminated from the terms laid out in the Employee Handbook. It provides:

> This handbook is not a contract of employment. The Company reserves the

> right to change, modify, augment or delete benefits, entitlements, wages and working conditions at any time; and no promises for future consideration are made or implied by the descriptions contained in this handbook. . . . In addition, preferential treatment is afforded employees whose positions may have been eliminated due to reorganization. The posting process can be suspended to allow these employees to interview for available openings provided they meet the minimum position qualifications.

(Velantzas-Austin Cert., Exh. K).

ANALYSIS

I. Standard for Summary Judgment

Federal Rule of Civil Procedure 56(c) provides that summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law" Fed. R. Civ. P. 56(c); *see also Chipollini v. Spencer Gifts Inc.*, 814 F.2d 893, 896 (3d Cir.) (*en banc*), *cert. dismissed,* 483 U.S. 1052 (1987). In deciding a motion for summary judgment, a court must view facts in the light most favorable to the nonmoving party and must resolve any reasonable doubt as to the existence of a genuine issue of fact against the moving party. *Continental Insurance Co. v. Bodie,* 682 F.2d 436, 438 (3d Cir. 1982). The moving party has the

burden of establishing that there exists no genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

The Supreme Court has stated that, in applying the criteria for granting summary judgment,

> the judge must ask . . . not whether . . . the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict. . . .

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).

A fact is "material" only if it will affect the outcome of a lawsuit under the applicable law, and a dispute over a material fact is "genuine" if the evidence is such that a reasonable fact finder could return a verdict for the nonmoving party. (*Id.*)

In order to survive a motion for summary judgment, a plaintiff must present "more than a mere scintilla of evidence" in his favor. He "cannot simply reallege factually unsupported allegations contained in his pleadings." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 325 (1986); *see also Maguire v. Hughes Aircraft Corp.*, 912 F.2d 67, 72 (3d Cir. 1990). Only

evidence that would be admissible at trial may be used to test a summary judgment motion. Evidence whose foundation is deficient must be excluded from consideration. *Williams v. Borough of West Chester, PA*, 891 F.2d 458, 466 (3d Cir. 1989); *see also Trap Rock Indus., Inc. v. Local 825 Int'l Union of Operating Eng'rs*, 982 F.2d 884, 890-91 (3d Cir. 1992).

II. Plaintiff Cannot Point to Any Genuine Issue of Fact that Would Demonstrate that Defendant Discriminated Against him on Account of His Age.

A. Age Discrimination

In order to establish a case of discrimination under the ADEA or the NJLAD, the plaintiff must prove that his age was a determinative factor in Mercedes' decision affecting his employment. *Seman v. Coplay Cement Co.*, 26 F.3d 428 (3d Cir. 1994); *Turner v. Schering-Plough Corp.*, 901 F.2d 335, 341 (3d Cir. 1990); *Anderson v. Exxon Co.*, 89 N.J. 483, 492 (1982). Initially, a plaintiff must prove four *prima facie* elements to maintain an action under NJLAD. *Roebuck v. Drexel University*, 852 F.2d 715, 726 (3d Cir. 1988); *Miller v. Beneficial Management Corp.*, 977 F.2d 834, 846 (3d Cir. 1992); They are:

1. The plaintiff is a member of a protected class.

2. The plaintiff was qualified for the position.

3. The plaintiff was dismissed despite his qualifications.

> 4. He was replaced by an individual not in the protected class, [over 40].

Miller, 977 F.2d at 847.

Under the *McDonnell-Douglas* scheme for discrimination actions, establishment of a *prima facie* case creates a presumption that the employer unlawfully discriminated against the employee. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). "Presumption" in a discrimination action means that once a plaintiff proves the necessary *prima facie* elements, a conclusion in his favor is required absent an adequate explanation by the defendant. *St. Mary's Honor Center v. Hicks*, __ U.S. __, 113 S. Ct. 2742, 2746 (1993). This presumption places upon the defendant the burden of producing a legitimate, non-discriminatory reason for the adverse employment decision. (*Id.* at 2747).

The defendant does not need to prove that it relied upon the non-discriminatory reason to rebut the presumption, only that one existed. (*Id.* at 2748). Once the defendant demonstrates a legitimate business purpose, plaintiff bears the burden of proving the defense's proffered reason for termination was merely a pretext for discrimination. *Burdine*, 450 U.S. at 257. A pretext may be proven through direct or circumstantial evidence attacking the credibility of defendant's reason. *Gray v. York Newspapers Inc.*, 957 F.2d 1070, 1078 (3d Cir. 1992)

B. The Instant Case

Plaintiff has clearly established the first three elements of his *prima facie* case. He is a member of the protected class, qualified for the position he held and was terminated.

(Velantzas-Austin Cert., Exh. L). What is not clear is whether he was replaced with someone not in the protected class.

As Mr. Ahlden was 28 at the time he came to the New Jersey plant from Mercedes in Germany, he is not a member of the protected class. However, plaintiff has not sufficiently demonstrated that Mr. Ahlden was hired to replace him. While Mr. Ahlden appears to have assume some of plaintiff's former responsibilities, he did not take over the job of Parts Import Supervisor. (Ahlden Dep. at 22-23; Ruppert Dep. at 24-29, 45). In addition, other employees in the department assumed some of plaintiff's former responsibilities as his position was eliminated and consolidated. (Ruppert Cert. ¶ 7). Furthermore, approximately half of the employees fired as a result of the RIF were not within the protected class. (Gilson Cert., ¶ 9). This Court does not believe that plaintiff has established a *prima facie* case.

Furthermore, when a *prima facie* case has been demonstrated, the burden shifts to defendant to show a legitimate, nondiscriminatory reason for the termination of plaintiff. Defendant points to the RIF including the abolition of plaintiff's position in the Mercedes-Benz of North America structure. This demonstrates a sufficient non-discriminatory reason. *Palochko v. Manville Corp.*, 21 F.3d 981, 982 (10th Cir. 1994). While plaintiff points to circumstances which he believes evidence an intent on the part of defendant to discriminate against him, this Court determines that he has not sustained his burden sufficiently to defeat the present summary judgment motion. He points to nothing in the record that demonstrates an intent to discriminate. The single and "stray" remark of "age before beauty" does not demonstrate a discriminatory motive. *Gagne v. Northwestern Nat. Ins. Co.*, 881 F.2d 309, 314 (6th Cir. 1989) (single statement by a supervisor that he "needed younger blood" did not rebut the employer's non-discriminatory reason

of poor work performance as to the precipitation of the discharge and summary judgment was granted). Mr. Ruppert, who made the comment, is approximately the same age as plaintiff; therefore, "nothing in the record suggests anything but two middle-aged men bantering over seniority." *Mullen v. New Jersey Steel Corp.*, 733 F. Supp. 1534, 1551 (D.N.J. 1990). There is also evidence in the record that the comment was a translation of a German expression of respect. (Dammer Dep. at 192). Therefore, summary judgment in favor of the defendant is granted.

III. Mercedes has not Violated any Clear Mandate of Public Policy in its Termination of Plaintiff.

The parties do not dispute that the public policy exception cannot be construed to require job security in the context of a reduction in force, nor is there any contention that an employer has no duty to reassign senior employees. Plaintiff claims that defendant violated public policy by retaliating against him after he decided not to accept defendant's offer of early retirement. Specifically, plaintiff claims that after his decision, defendant ignored him and subjected him to demeaning and stressful treatment which treatment is allegedly violative of some strong public policy.

A limited cause of action exists for wrongful discharge where an employee is terminated for conduct which is protected by public policy. *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58 (1980). For this action to arise, the plaintiff must identify such public policy. (*Id.*) Sources of public policy include legislation, administrative rules, regulations and judicial decisions. (*Id.* at 72). If an at-will employee, like plaintiff, cannot point to any specific public policy which protects the conduct for which he was fired, he may be fired with or without cause.

Appendix E

Unquestionably there exists a strong public policy against age discrimination. However, there is nothing in the record, other than the bald assertions made by plaintiff, to demonstrate or create an inference that he was the victim of discrimination or retaliation. This Court determines that he was terminated as part of a reduction in force. It is clear that there is no strong mandate of public policy which encourages job security in the face of such a restructuring. *Brunner v. Abvex Corp.*, 661 F. Supp. 1351 (D.N.J. 1986). Further, a *Pierce* claim is limited to cases where a statute does not address the same right alleged to reflect public policy. Here the ADEA and NJLAD address that very right; therefore, a *Pierce* claim will not also lie for alleged age discrimination. As such, summary judgment on behalf of defendant is appropriate.

IV. Plaintiff Cannot Prevail on a Theory of Implied Contract or a Claim that Defendant Breached a Duty of Good Faith by Failing to Follow Alleged Procedures in the Employee Handbook.

Plaintiff was an at-will employee. Such status is protected if certain representations in an Employee Manual or Handbook establish an implied promise not to terminate without just cause. *Woolley v. Hoffman-La Roche. Inc.*, 99 N.J. 284, *modified*, 101 N.J. 10 (1985). However, if the manual contains an explicit disclaimer that specifically states that the employer remains free to terminate an employee without cause, the manual is not a binding contract of employment and the employee may be so terminated. (*Id.* at 309); *Preston v. Claridge Hotel & Casino, Ltd.*, 231 N.J. Super. 81 (1989). The *Woolley* Court held:

> The provisions of the manual concerning job security shall be considered binding unless

> the manual elsewhere prominently and unmistakably indicates that those provisions shall not be binding or unless there is some other similar proof of the employer's intent not to be bound. . . . All that need be done is the inclusion in a very prominent position of an appropriate statement that there is no promise of any kind by the employer contained in the manual; that regardless of what the manual says or provides, the employer promises nothing and remains free to change wages and all other working conditions without having to consult anyone and without anyone's agreement; and that the employer continues to have the absolute power to fire anyone with or without good cause.

Woolley, 99 N.J. at 307, 309.

Even assuming that the provision, "preferential treatment is afforded employees whose positions may have been . . . eliminated due to reorganization" is reasonably interpreted to mean that the employee is promised maximum job security, this Court believes that defendant has included in the Employee Manual a sufficient disclaimer. (Velantzas-Austin Cert., Exh. K). On the first page, defendant lays out:

> This handbook is not a contract of employment. The Company reserves the right to change, modify, augment or delete benefits, entitlements, wages and working conditions at any time; and no promises for

future consideration are made or implied by the descriptions contained in this handbook.

(*Id.*) In the face of this disclaimer, a reasonable employee would believe that he remained an at-will employee who was not necessarily entitled to preferential treatment in the event of a reduction in force.

In addition, the statement that refers to preferential treatment is found in the section of the employee Manual which pertains to posting procedures for open positions. (Freeman Supp. Cert., Exh. A). At the time that plaintiff was terminated, there were no open positions. (Ruppert Dep. at 40). Prior to plaintiff's termination, there were two open clerk positions but they, along with another clerk and plaintiff, were eliminated from the Import Department altogether. (*Id.*) Therefore, summary judgment in favor of defendant Mercedes is appropriate.

CONCLUSION

For the foregoing reasons, defendant's motion for summary judgment is granted as to all claims, and this action is dismissed.

s/ John W. Bissell
JOHN W. BISSELL
United States District Judge

DATED: April 6, 1995

Appendix E

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 92-2891

LEO A. DAMMER,

Plaintiff,

v.

MERCEDES-BENZ OF NORTH AMERICA, INC.,

Defendant.

ORDER

For the reasons set forth in the Court's Opinion filed herewith,

It is on this 6th day of April, 1995,

ORDERED that defendant's motion for summary judgment be and it hereby is granted, and plaintiff's complaint is dismissed in its entirety.

s/ John W. Bissell
JOHN W. BISSELL
United States District Judge

APPENDIX F — EEOC DETERMINATION LETTER DATED MAY 8, 1992

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
NEWARK AREA OFFICE
60 PARK PLACE
NEWARK NJ 07102

Charge Number: 171920158

Leo A. Dammer
One Colonial Terrace
Upper Saddle River, New Jersey 07458

Charging Party

Mercedes Benz of N.A., Inc.
1 Mercedes Drive
Montvale, New Jersey 07645

Respondent

DETERMINATION

Under the authority vested in me by the Commission, I issue the following determination as to the merits of the above cited charge.

All requirements for coverage have been met. Charging Party alleged that he was discriminated against in violation of the ADEA in that he was discharge from his position as Import Supervisor on September 4, 1991 because of his age (56).

Examination of the evidence indicates that due to economic and business necessity, Respondent conducted a company-wide

reduction in force. Job functions were analyzed to determine which positions could be eliminated without negatively impacting the operations of the department. Jobs were eliminated on the basis of anticipated needs. Evidence reveals that two (2) positions were eliminated in the Import Department. The positions were a Clerk position and Charging Party's position as Import Supervisor. The Clerk affected is under the protected age group. The functions of the Import Supervisor position were transferred to remaining department positions. Nine (9) employees in the department were not affected. Five (5) are within the protected age group. Seventy-four (74) employees were affected company-wide by the reduction in force. Thirty-three (33) are within the protected age group.

Respondent's present workforce is composed of 583 employees of which 300 are within the protected age group.

Based on this analysis, I have determined that the evidence obtained during the investigation does not establish a violation of the ADEA.

If the charge was filed within 180 days of the alleged discrimination (300 days in states with a state age discrimination law), Charging Party may sue under the ADEA for recovery of backpay, an equal amount as liquidated damages, appropriate make-whole or injunctive relief, and attorneys' fees and court costs.

A lawsuit under the Age Discrimination in Employment Act ordinarily must be filed within 2 years of the date of discrimination alleged in the charge. On November 21, 1991, the ADEA was amended to eliminate this 2 year limit. An ADEA lawsuit may now be filed any time from 60 days after a charge if

filed until 90 days after receipt of notice that EEOC has completed action on the charge. Because it is not clear whether this amendment applies to instances of alleged discrimination **occurring before November 21, 1991**, if Charging Party decides to sue, a lawsuit should be brought **within 2 years of the date of alleged discrimination and within 90 days of receipt of this letter, *whichever is earlier***, in order to assure the right to sue.

s/ Corrado Gigante
Corrado Gigante
Area Director

May 8, 1992
Date

cc:

5-8-92
Date of Mailing

No. 95-1869

Supreme Court, U.S.
FILED
JUN 19 1996
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

LEO A. DAMMER,

Petitioner,

vs.

MERCEDES-BENZ OF NORTH AMERICA, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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30 pp

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to consider the questions presented by Petitioner in light of the fact that both questions presented by this Petition are moot because in entering and upholding summary judgment in favor of Respondent, neither court below held that a plaintiff asserting an age discrimination case in the context of a reduction-in-force must prove that he was replaced by an individual outside the protected class in order to establish a *prima facie* case.

2. Whether this Court has jurisdiction to consider the questions presented by Petitioner in light of the fact that both questions presented by this Petition are moot because in entering and upholding summary judgment in favor of Respondent, both courts below assumed that Petitioner established his *prima facie* case, but held that Respondent was nonetheless entitled to summary judgment because Petitioner failed to present evidence that Respondent's proffered reason for his termination was pretext.

STATEMENT PURSUANT TO RULE 29.6

The parent company of Mercedes-Benz of North America, Inc. is Daimler Benz N.A. Corp. Mercedes-Benz of North America, Inc. does not have any nonwholly owned subsidiaries.

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STATEMENT OF THE CASE

This case arose as a result of the termination of Leo A. Dammer (hereinafter "Mr. Dammer") during the implementation of a company-wide reduction-in-force which took place at Mercedes-Benz of North America, Inc. (hereinafter "MBNA") on or about September 4, 1991. In his complaint, Mr. Dammer alleged *inter alia* that he was terminated from his position at MBNA as a result of his age in violation of the New Jersey Law Against Discrimination (hereinafter the "NJLAD") and the Age Discrimination in Employment Act (hereinafter the "ADEA").

On or about December 26, 1991, Mr. Dammer filed a charge against MBNA with the Division of Civil Rights/Equal Employment Opportunity Commission (hereinafter the "EEOC"). Mr. Dammer alleged that he was terminated from his position at MBNA because of his age and in violation of the ADEA. On or about May 8, 1992, after an analysis of the merits of Mr. Dammer's charge, the EEOC determined that the evidence did not establish a violation of the ADEA and entered a finding of "no probable cause."

Thereafter, Mr. Dammer filed the instant action again asserting the very same allegations already dismissed by the EEOC. MBNA filed a motion for summary judgment. After oral argument, which was heard on or about March 27, 1995, the District Court granted MBNA's motion, dismissing Mr. Dammer's complaint in its entirety. Summary judgment was upheld on appeal to the Circuit Court and Mr. Dammer's petition for rehearing was denied.

STATEMENT OF FACTS

Mr. Dammer is a former employee of MBNA having been

employed as an import supervisor from April 3, 1972 through September 4, 1991.

On September 4, 1991, MBNA implemented a company-wide reduction of its workforce. The restructuring of MBNA's home and field office operations was necessitated by severe economic and business conditions facing MBNA. Specifically, from 1986 through 1991, MBNA suffered a sharp downturn in automobile sales. During that period, new car sales dropped about 42%, from approximately 100,000 in 1986 to approximately 58,000 in 1991.

MBNA's reduction-in-force involved the elimination of numerous employee positions and the consolidation and/or elimination of job functions based upon anticipated business needs.

At the time of the reduction-in-force, Mr. Dammer was employed in the import department at MBNA's headquarters in Montvale, New Jersey. As part of the company-wide restructuring, two positions within the import department were eliminated: (1) the position of import supervisor; and (2) one import clerk position. Both positions were eliminated because it was clear that the essential functions of those positions could be absorbed by the remaining employees in the department with minimal negative impact on the department's current and anticipated operations. Accordingly, the positions were entirely eliminated and their essential functions assigned to the remaining employees in the department. In his deposition, Mr. Dammer admitted that he had not been replaced and that his job duties were absorbed by the remaining staff.

Prior to the reduction-in-force, MBNA employed 657 employees at its Montvale headquarters. Of MBNA's pre-reduction employees, 333 were over the age of 40 (50.68%) and 324 were under the age of 40 (49.32%). As a result of the

reduction-in-force, 74 employees were terminated. Of the employees terminated, 33 were over the age of 40 (44.59%) and 41 were under the age of 40 (55.41%). Of MBNA's workforce remaining after the reduction, 300 were over 40 years of age (51.46%) and 283 were under the age of 40 (48.54%). During the course of the workforce reduction, MBNA eliminated the positions of 12.65% of its under-40 workers, while eliminating only 9.91% of the positions previously held by its over-40 workers. After the workforce reduction, the percentage of MBNA's employees who were over 40 years of age actually increased by .78%.

Mr. Dammer offered no evidence whatsoever to contradict this statistical evidence.

With respect to Mr. Dammer's department, prior to the reduction-in-force, there were 11 employees of whom six were over the age of 40 (54.55%) and five of whom were under the age of 40 (45.45%). The positions of two employees, Mr. Dammer who was over 40 and an import clerk who was under 40, were eliminated. During the course of the workforce reduction, MBNA eliminated 20% of its under-40 workers in the import department, while eliminating only 16.67% of its over-40 workers in the department. As a result of the workforce reduction as it specifically related to Mr. Dammer's department, 55.56% of the remaining employees in the import department are over 40 and 44.44% are under 40. Accordingly, the reduction-in-force resulted in an 1.01% increase in the number of over-40 workers in MBNA's import department.

Once again, Mr. Dammer offered no evidence to dispute these statistics.

In August 1990, more than one year prior to MBNA's reduction-in-force, MBNA offered a voluntary early retirement

package to employees who were at least 55 years of age and had at least 10 years of service with MBNA. Employees who were offered the package had until October 31, 1990 to decide whether or not they would take early retirement. Mr. Dammer was one of the employees who was offered this retirement package. In support of his claims, Mr. Dammer offered the bald assertion that by the time he declined the retirement package, his superiors had already decided to force him out of the import department.

Mr. Dammer offered absolutely no proof below to support this assertion.

Mr. Dammer claimed that four to six weeks after he received the retirement package for consideration, his direct supervisor Erich Lenz told him that the manager of logistics and administrative services, Ernst Ruppert, (the head of Mr. Dammer's department) wanted to know if Mr. Dammer had made his decision yet. Below, Mr. Dammer maintained that this in some way indicated that his superiors wanted him to retire. Mr. Dammer also maintained that this evidenced his superiors' intent in or about August 1990 to terminate him at some later point if he did not voluntarily retire.

Nevertheless, Mr. Dammer's allegations were contradicted by his own deposition testimony wherein he admitted that he did not know when the 1991 reduction-in-force was formulated and that he did not know if the reduction was discussed by Messrs. Ruppert and Lenz at or around the time that he was offered the retirement package in August 1990. Mr. Dammer's unsubstantiated theory was further contradicted by the testimony of Messrs. Ruppert and Lenz because both men testified that they only questioned Mr. Dammer because they were concerned that they would have to replace him if he chose early retirement. According to the testimony of Messrs. Ruppert and Lenz, neither had any plan or intention of eliminating his

position or reducing the staff of the import department in or about August 1990. Further, Mr. Lenz testified that he had no idea of plans to eliminate Mr. Dammer's position until one week prior to the implementation of the reduction-in-force.

Moreover, the District Court found that Mr. Dammer admitted in deposition testimony that no one influenced or even tried to influence his decision regarding early retirement in August 1990. Mr. Dammer also admitted that no one in his department said anything to him which led him to believe that he would be forced out of the department if he declined early retirement. Further, Mr. Dammer admitted that he never heard anyone say anything that led him to believe that his superiors were trying to get rid of him.

To support his claim of age bias, Mr. Dammer pointed to the hiring of three import clerks six to nine months prior to the reduction-in-force, as well as the hiring of a younger employee, Kay-Wolf Ahlden, five months prior to the reduction. However, Mr. Dammer admitted the following facts which completely contradict his allegations: (1) one of the three import clerks was within the protected class (53 years old); (2) the two clerks who were not within the protected class were hired to replace two other clerks who opted for early retirement; and (3) none of the three held a position similar to his own. (*See* Petition at App. 18a.) Pursuant to the testimony of Messrs. Ruppert and Ahlden, Mr. Ahlden's position was unrelated to the position previously held by Mr. Dammer and Mr. Ahlden did not assume any of Mr. Dammer's job duties when he began working for MBNA in April 1991. Further, Mr. Ahlden was not similarly situated to any other employee in the import department because he was an expatriate, a resident of Germany under contract with Mercedes-Benz A.G., working for MBNA for a limited time. Mr. Ahlden was brought to this country because of his expertise in "logistics," a field unrelated to Mr. Dammer's duties. Pursuant to his contract, Mr.

Ahlden was sent to the United States to work for MBNA until April 1995. Moreover, Mr. Dammer specifically admits that Mr. Ahlden was his superior because he "ran the department." Additionally, Mr. Ahlden did not replace Mr. Dammer after the reduction-in-force.

Finally, Mr. Dammer contended that age was "an influence" in Mr. Ruppert's decision to eliminate his position. In support of this contention, Mr. Dammer testified that Mr. Ruppert, who is merely four years younger than Mr. Dammer, "didn't like anyone working for him who was older." Nonetheless, Mr. Dammer admitted that Ernest Angelino, the manager of domestic traffic, is older that Mr. Ruppert and retained his position in Mr. Ruppert's department after the reduction-in-force. Further, the 53 year old clerk (discussed in the immediately preceding paragraph) is also older than Mr. Ruppert and was not terminated as a result of the reduction-in-force.

Mr. Dammer admitted that he never complained to anyone that he was the victim of age discrimination prior to his September 4, 1991 termination. Nor did he make any such claim on the date of his termination. Within days after his position was eliminated Mr. Dammer contacted and met with Robert Ertzen of MBNA's human resources department, but Mr. Dammer never mentioned age discrimination at this meeting.

Mr. Dammer expressly acknowledged MBNA's right to reduce staff. Finally, Mr. Dammer testified that he did not object to MBNA eliminating the import supervisor position; he just objected to MBNA eliminating the position while he held it.

SUMMARY OF ARGUMENT

The record below establishes that Mr. Dammer could not demonstrate, through direct or circumstantial evidence, any

facts which would allow one to conclude that he could bear the burden of proving that age was a determinative factor in MBNA's decision to eliminate his position. Although he was given every opportunity to present the District Court and the Circuit Court with evidence from which an age animus could be inferred, Mr. Dammer failed to present evidence sufficient to make out even a prima facie case of age discrimination. Significantly, Mr. Dammer could not establish that he — *and others within the protected class* — were treated less favorably than those outside the protected class because the statistical evidence clearly demonstrated that employees who were over 40 faired better than employees under 40. Moreover, Mr. Dammer proffered nothing beyond subjective conclusions, which he requested the courts below to deem "reasonable inferences," to support his allegation that MBNA's legitimate, nondiscriminatory reasons for the reduction-in-force and the elimination of his position were pretext. The District Court properly found that Mr. Dammer's subjective conclusions were wholly unsupported by the evidence, and thus awarded summary judgment to MBNA on Mr. Dammer's age discrimination claims and the Circuit Court properly upheld the grant of summary judgment.

This Court should refuse to consider the questions raised by Mr. Dammer's Petition for Writ of Certiorari because, as will be discussed at length below, both questions raised by the Petition are moot in that both presume that courts below held that the final element of a *prima facie* case of age discrimination, when considered in the context of a reduction-in-force, requires that a plaintiff prove that he was replaced by an individual outside the protected class (*i.e.*, someone under the age of 40). Both questions further presuppose that both courts below found that Mr. Dammer failed to establish a *prima facie* case because he could not establish that he was replaced at all — by someone within or outside the protected class.

While both courts below found that Mr. Dammer could not establish that he was replaced by a younger individual, neither court terminated its analysis after reaching that conclusion. Instead, both courts went on to analyze Mr. Dammer's ability to establish another element — an element unique to an age discrimination case in the context of a reduction-in-force — specifically: whether Mr. Dammer *and others within the protected class* were treated less favorably during the reduction-in-force that those outside the class. The uncontroverted statistical evidence clearly established that employees over the age of 40 actually faired better than those under the age of 40. As such, both courts properly held that Mr. Dammer could not establish a *prima facie* case of age discrimination.

It should also be noted that even though both courts below found that Mr. Dammer could not establish a *prima facie* case of age discrimination, each assumed *arguendo* that Mr. Dammer had met his burden and continued their analysis to determine whether Mr. Dammer could establish that MBNA's proffered reason for his termination — its reduction-in-force — was a mere pretext for age discrimination. Both courts found that Mr. Dammer could offer no evidence whatsoever that would could lead a jury to conclude that the reduction-in-force was a pretext.

Inasmuch as neither court below granted (or upheld) summary judgment because Mr. Dammer failed to establish that he was replaced by a younger employee, the questions presented to this Court by Mr. Dammer are moot. Therefore, this Court should refuse to consider the questions raised by Mr. Dammer and should refuse to grant the subject Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I.

THIS COURT DOES NOT HAVE JURISDICTION TO DECIDE THE QUESTIONS PRESENTED BY PETITIONER IN THAT BOTH QUESTIONS ARE MOOT BECAUSE NEITHER COURT BELOW RESTED ITS DECISION TO ENTER OR UPHOLD SUMMARY JUDGMENT ON THE FACT THAT MR. DAMMER FAILED TO ESTABLISH THAT HE WAS REPLACED BY AN INDIVIDUAL UNDER 40.

It has long been held that this Court has no power to issue advisory opinions on questions that are moot. *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S. Ct. 402, 404, 30 L. Ed. 2d 413 (1971); *St. Pierre v. United States*, 319 U.S. 41, 42, 63 S. Ct. 910, 911, 87 L. Ed. 1199 (1943); *Church of Scientology of California v. United States*, 506 U.S. 9, 12, 113 S. Ct. 447, 121 L. Ed. 2d 313, 319 (1992).

A question is deemed moot, and thus outside the jurisdiction of this Court, if the decision of this Court would not "affect the rights of the litigants before it." *Rice, supra*, 404 U.S. at 246; *St. Pierre, supra*, 319 U.S. at 42.

As noted by this Court in *Rice*, to be cognizable, the questions raised in a petition must "[touch] the legal relations of the parties having adverse relations." *Id.* at 246 (citations omitted). In other words, consideration of the question or questions presented must be such that an answer rendered by this Court would result in "specific relief" to one of the parties in interest. *Id.*

In the case at bar, Mr. Dammer presents two questions, both

of which focus on the fourth and final element of a *prima facie* case of a plaintiff asserting age discrimination in the context of a reduction-in-force. Both questions presume two things: (a) that both courts below granted (or upheld) summary judgment against Mr. Dammer because he could not establish a *prima facie* case of age discrimination because he failed to show that he was replaced by someone outside the protected class; and (b) that both courts below terminated the analysis of the merits of his case once they determined that Mr. Dammer could not establish a *prima facie* case.

Both questions presented by Mr. Dammer are moot because regardless of how this Court answers either question, there will be no resulting relief to Mr. Dammer or MBNA. Summary judgment was not entered in favor of MBNA solely because Mr. Dammer failed to show that he was replaced by someone under the age of 40. Both courts below specifically held that the uncontroverted evidence clearly established that in connection with its reduction-in-force, employees over the age of 40 faired better than those under the age of 40. Further, both courts below noted that this was the case not only company-wide, but also in Mr. Dammer's own department. (Petition at App. 7a and 23a.) As such, even if this Court grants Mr. Dammer's Petition and accepts his theory that a plaintiff asserting age discrimination in the context of a reduction-in-force need not show that he was replaced by someone under the age of 40, that decision will not affect the rights of Mr. Dammer or MBNA because neither decision below rested on Mr. Dammer's failure to present evidence to that effect.

Moreover, neither court below concluded the analysis of the merits of Mr. Dammer's case after determining that he could not establish a *prima facie* case of age discrimination. Instead, both courts below went further and assumed that he had met his *prima facie* burden. However, both courts below held that even if Mr.

Dammer could establish a *prima facie* case, he could not sustain the ultimate burden of proof because he failed to offer any evidence to show that MBNA's proffered reason for his termination — the reduction-in-force — was pretext.

Accordingly, even if this Court were to render an opinion on the elements of a *prima facie* case of age discrimination in the context of a reduction-in-force, and even if this Court found that the courts below should have analyzed the merits of Mr. Dammer's *prima facie* case under one of the two theories proposed by Mr. Dammer, that decision would not affect the rights of Mr. Dammer or MBNA because neither court rendered its decision based solely on the basis of Mr. Dammer's failure to establish a *prima facie* case of age discrimination.

II.

MR. DAMMER COULD NOT ESTABLISH A *PRIMA FACIE* CASE OF AGE DISCRIMINATION BELOW BECAUSE HE COULD NOT SHOW THAT EMPLOYEES OUTSIDE THE PROTECTED CLASS WERE TREATED MORE FAVORABLY THAN THOSE WITHIN THE PROTECTED CLASS.

A plaintiff's conclusory allegations are insufficient to prevent summary judgment. As this Court has emphasized, summary judgment procedures demand that the party opposing the motion present more than ephemeral allegations of some factual dispute. *See, e.g. Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986), *cert. denied*, 484 U.S. 1066, 108 S. Ct. 1028, 98 L. Ed. 2d 992 (U.S. Dist. Col. 1988); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986), *cert. denied*, 481 U.S. 1029, 107 S. Ct. 1955, 95 L. Ed. 2d

527 (1987). Where a prima facie right to summary judgment exists, as here, the burden is on the party opposing the motion to demonstrate, by competent evidence, that a genuine issue of fact exists for trial. *Celotex, supra,* 477 U.S. at 323-325.

The summary judgment standards are the same in ADEA actions as in other cases: summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Perry v. Prudential-Bache Securities, Inc.,* 738 F. Supp. 843, 850 (D.N.J.), *aff'd,* 904 F.2d 696 (3d Cir. 1989), *cert. denied,* 498 U.S. 958, 111 S. Ct. 386, 112 L. Ed. 2d 397 (1990) (citing *Celotex, supra*). Although the moving party bears the burden of demonstrating the absence of a dispute as to material facts, once a case for summary judgment has been made, the party opposing the motion must come forward with specific facts necessitating a trial. *Mullen v. New Jersey Steel Corp.,* 733 F. Supp. 1534, 1542 (D.N.J. 1990) (citing *Anderson, supra,* 477 U.S. at 249-250).

Mr. Dammer could not demonstrate the existence of facts that would allow one, even when viewing the record in the most indulgent way, to conclude that he could bear the ultimate burden of proving that age was a determinative factor in MBNA's decision to eliminate his position. *Duffy v. Wheeling Pittsburgh Steel Corp.,* 738 F.2d 1393, 1395 (3d Cir.), *cert. denied,* 469 U.S. 1087, 105 S. Ct. 592, 83 L. Ed. 2d 702 (1984) (emphasis added).

Mr. Dammer avers that this Court should grant certiorari because there is a conflict amongst the circuits with respect to the evidentiary burdens placed upon plaintiffs in age discrimination cases. That is not true because the Third Circuit adopts the same evidentiary burdens in ADEA claims as set forth by this Court in actions under Title VII. *Chipollini v. Spencer Gifts, Inc.,* 814 F.2d 893, 897 (3d Cir.), *cert. dismissed,* 483 U.S. 1052, 108 S. Ct.

26, 97 L. Ed.2d 815 (1987) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), *aff'd*, 528 F.2d 1102 (1976) and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981)); *Turner v. Schering-Plough Corp.*, 901 F.2d 335, 341 (3d Cir. 1990).

In the case at bar, to make out even a *prima facie* case, Mr. Dammer was required to demonstrate that:

> (1) he is a member of the protected class, *i.e.*, age 40 or over;
>
> (2) he was qualified for the job;
>
> (3) notwithstanding his qualifications, he was discharged as a result of a reduction-in-force; and
>
> (4) during the course of the reduction-in-force, employees who were not within the protected class were treated more favorably.

Healy, supra, 860 F.2d at 1214; *Duffy, supra*, 738 F.2d at 1395; *Massarsky v. General Motors Corp.*, 706 F.2d 111, 118 (3d Cir. 1983), *cert. denied*, 464 U.S. 937, 104 S. Ct. 348, 78 L. Ed. 2d 314.

MBNA did not argue, and neither court below found, that Mr. Dammer had to establish that he was replaced, actually or constructively, by an individual outside the protected class. The case law is clear: the *McDonnell Douglas* standard is flexible and, in the case of a reduction-in-force, must be molded to properly take into consideration factors unique to such a situation. Thus, as noted in the cases cited immediately above, in the case of a reduction-in-force, the fourth prong of the

analysis does not address by whom the employee was replaced (because the assumption is that a plaintiff will not be able to point to any replacement inasmuch as the employer is cutting staff), but rather focuses on the manner in which employees over the age of 40 were treated in comparison to employees under the age of 40.

In the case at bar, the analysis of both courts below could have stopped here because in spite of efforts to obfuscate the record and manufacture questions of fact, it is inescapably clear that Mr. Dammer failed to set forth evidence which meets the final element of a *prima facie* case in the context of a reduction-in-force.

Mr. Dammer proffered no evidence that employees under the age of 40 — either within his department or elsewhere within MBNA — were treated more favorably. In fact, the statistical evidence clearly shows that employees over 40 faired better than did younger employees and both courts below relied upon that uncontroverted statistical evidence in concluding that Mr. Dammer could not establish a *prima facie* case of age discrimination. (Petition at App. 7a and 23a.)

Mr. Dammer's only attempt to refute the statistical evidence below consisted of characterizing the evidence as self-serving, vague and/or questionable. There is nothing vague or questionable about MBNA's very clear and simple statistical evidence. Numbers are numbers, they speak for themselves. Mr. Dammer's bald assertions did nothing to diminish the truth — and the truth is that company-wide, 55.41% of MBNA employees under the age of 40 were discharged as a result of the reduction-in-force, while only 44.59% of employees over the age of 40 were discharged. The same holds true for petitioner's department, wherein the reduction-in-force resulted in a 1.01% increase in the number of employees within the protected class. These facts, in part, compelled the EEOC to find that MBNA did

not violate the ADEA, and to reject petitioner's charge of age discrimination. These facts also support the validity of the decisions below and, more importantly, underscore the reason why this Court should not grant Mr. Dammer's Petition. The only questions presented assume that both courts below failed to consider the relevant fourth prong (*i.e.*, whether younger employee were treated more favorable than older employees). A review of the opinions below clearly indicates that this is not the case. Both courts properly noted that employees within the protected class were treated *better* than employees outside the protected class. As such, Mr. Dammer's Petition fails to present any question which would warrant consideration by this Court.

The mere fact that petitioner, who is within the protected class, lost his job does not give rise to a *prima facie* cause of action for age discrimination. Petitioner must go beyond that and show that he *and other protected employees* were treated less favorably than those outside the protected class. *See, e.g., Massarsky, supra,* 706 F.2d at 121; *Holt v. Gamewell Corp.*, 797 F.2d 36, 38 (1st Cir. 1986). Mr. Dammer could not do that; therefore, as a matter of law, he could not establish a *prima facie* case of age discrimination under federal or state law.

The District Court and Circuit Court specifically found that Mr. Dammer did not demonstrate through direct or circumstantial evidence, that he was replaced by an employee outside the protected class. Mr. Dammer cited — out of context — the District Court's statement that it "is not clear whether [plaintiff] was replaced with someone not in the protected class." Mr. Dammer cited this portion of the opinion in an attempt to mislead the Circuit Court and insinuate that the District Court found in MBNA's favor without reaching a conclusion of fact and/or law as to whether or not Mr. Dammer was replaced by a younger employee. Mr. Dammer conveniently omitted the immediately following paragraph of the Opinion wherein the

District Court specifically found that: (a) employees both within and outside the class assumed petitioner's duties (not replaced him) after his position was eliminated; and (b) approximately one-half of the employees terminated during the reduction-in-force were not within the protected class. (Petition at App. 23a.)

Both courts below properly found that petitioner could not show that he and other protected employees were treated less favorably than those outside the protected class. Therefore, the District Court properly held that, as a matter of law, Mr. Dammer could not establish a *prima facie* case of age discrimination under federal or state law and the Circuit Court properly upheld that decision.

Inasmuch as neither court below held that Mr. Dammer had to prove that he was replaced by an individual outside the protected class in order to establish his *prima facie* case, an answer to the questions presented by this Petition would not affect the rights of either party. As such, any opinion would be merely advisory. Accordingly, this Court should deny Mr. Dammer's Petition because it lacks jurisdiction to consider the questions presented.

III.

REGARDLESS OF WHAT THIS COURT DEEMS TO BE THE PROPER FINAL ELEMENT OF A *PRIMA FACIE* CASE, THE PARTIES' RIGHTS WILL NOT BE AFFECTED BECAUSE MR. DAMMER DOES NOT, BY THIS PETITION, CHALLENGE THE LOWER COURTS' FINDINGS REGARDING HIS FAILURE TO MEET HIS ULTIMATE BURDEN OF PROVING PRETEXT.

Notwithstanding their finding that Mr. Dammer did not establish a *prima* facie case of age discrimination, both courts

below went beyond the *prima facie* analysis, to find in MBNA's favor because Mr. Dammer proffered no evidence to support the allegation that MBNA's nondiscriminatory business reasons for eliminating his position were pretext. (Petition at App. 7a-8a and 23a.)[1] By his own admission, Mr. Dammer could point to no direct evidence of discrimination. (Petition at 6.) Instead, Mr. Dammer jumped to several conclusions which are wholly unsupported by evidence and asks that this Court find them "reasonable inferences." Mere subjective conclusions or assertions offered by counsel in a brief do not establish the existence of a genuine issue of material fact. *Perez Perez v. Key Pharmaceuticals, Inc.*, 729 F. Supp. 204, 207 (D. Puerto Rico 1989).

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1. During his deposition, Mr. Dammer pointed to a stray remark allegedly made by Mr. Ruppert, "age before beauty," as circumstantial evidence of an age animus. Below (and here again), Mr. Dammer admitted that he had no direct evidence of age discrimination and argued that MBNA raised the issue of the stray remark "as a smoke screen to hide the strong inferences of circumstantial evidence of age discrimination." In fact, MBNA raised the issue because it was the *only* circumstantial evidence identified by Mr. Dammer. The stray remark is insufficient to give rise to an inference of age discrimination. *See, e.g., Mullen v. New Jersey Steel Corp.*, 733 F. Supp. 1534, 1551 (D.N.J. 1990); *Perry v. Prudential-Bache Securities, Inc.*, 738 F. Supp. 843, 851 (D.N.J. 1989), *aff'd*, 904 F.2d 696 (3d Cir. 1989); *Ezold v. Wolf, Block, Schorr and Solis-Cohen*, 983 F.2d 509, 545 (3d Cir. 1992), *cert. denied*, 114 S. Ct. 88, 126 L. Ed. 2d 56 (1993); *Melnyk v. Adria Laboratories*, 799 F. Supp. 301, 319 (W.D.N.Y. 1992); *Gagne v. Northwestern Nat. Ins. Co.*, 881 F.2d 309, 314 (6th Cir. 1989); *Waggoner v. City of Garland, Texas*, 987 F.2d 1160, 1166 (5th Cir. 1993); *Merrick v. Farmers Ins. Group*, 892 F.2d 1434, 1438 (9th Cir. 1990). This is particularly true in the case at bar because, as noted by the courts, Mr. Dammer, who was born in Germany, admitted that the statement made by Mr. Ruppert, also born in Germany, is a German expression of respect. (Petition at App. 8a and 23a-24a.) More importantly, Mr. Dammer, both below and before this Court, specifically abandoned any claim that the remark is evidence of age discrimination.

Below, Mr. Dammer relied upon *Fuentes v. Perskie*, 32 F.3d 759 (3d Cir. 1994) and *Torre v. Casio, Inc.*, 42 F.3d 825 (1994) in support of his contention that to withstand summary judgment he need only discredit MBNA's proffered reasons for his termination, or adduce evidence which indicates that discrimination was more likely than not the motivating or determinative factor for the termination. Apart from utterly failing to discredit MBNA's justification for eliminating petitioner's position, the cases cited by petitioner supported MBNA's application for summary judgment.

Fuentes, supra, states that a plaintiff must show that the proffered reasons were either "post hoc fabrication or otherwise did not actually motivate the employment action . . . ." *Id.* at 764. Further, the *Fuentes* court states that a plaintiff must "cast substantial doubt" on the proffered reasons, and that it is not enough to show "that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent." *Id.* at 764-765. In *Fuentes,* the court granted summary judgment in favor of the defendant-employer because the plaintiff failed to "meaningfully throw into question" the defendant's proffered reasons. *Id.* at 764. The court stated that the fact that a department head who, faced with a directive to eliminate staff because of shrinking budgets, reorganized his department and hired new managers who he felt were best suited for positions created during the reorganization, did "not throw real doubt on the employer's proffered reason" for the plaintiff's termination.

Mr. Dammer argued that on the same type of facts present in *Fuentes,* he had succeeded in casting doubt on MBNA's explanation of the reorganization of the Import Department. He did not! The uncontroverted evidence clearly indicates that no one was brought in to replace Mr. Dammer and that his duties

were absorbed by the remaining staff. Mr. Ahlden was brought to the United States from Germany to help MBNA streamline and restructure its import department, thus making it more efficient. Prior to coming to the United States, Mr. Ahlden attended college and universities in Brenerhaven, Germany studying logistics. Thereafter, he joined Mercedes-Benz in Stuttgart, Germany where he was responsible for logistics. In Germany, Mr. Ahlden was responsible for, among other things, developing transportation routes, negotiating contracts, analyzing transportation flow and overseas customers' needs, and developing the best modes of transporting parts. When he arrived in this country, Mr. Ahlden, consistent with his background, education and expertise, assumed the duties, responsibility and authority necessary to restructure and streamline MBNA's Import Department.

In an effort to create a factual dispute, Mr. Dammer states that Mr. Ahlden basically took over the Import Department. Petitioner appears to be suggesting that Mr. Ahlden was brought to this country to replace him. Again, this is simply false. By Mr. Dammer's own admissions, Mr. Ahlden was not in an equivalent job position. Clearly, Mr. Ahlden assumed a position with far more responsibility and authority than Mr. Dammer. Mr. Dammer had no qualifications in Mr. Ahlden's area of expertise. Instead, Mr. Dammer supervised import clerks prior to the elimination of his position. After the restructuring, there were fewer import clerks and thus no need for a superfluous layer of supervision. The effort to suggest that Mr. Ahlden took over Mr. Dammer's duties is simply not supported in the record.

Moreover, Mr. Ahlden's subsequent promotion does nothing to bolster petitioner's unsupported allegations that Mr. Ahlden took over his position. Mr. Ahlden was not promoted to Mr. Dammer's position. When Mr. Ahlden was promoted, he replaced Mr. Dammer's supervisor, Mr. Lenz. Mr. Dammer's

position of import supervisor was eliminated for unrelated reasons having nothing to do with Mr. Ahlden. It is undisputed that since there were fewer import clerks after the reorganization, there was no need for an import supervisor and petitioner's position was eliminated. Thus petitioner's preoccupation with Mr. Ahlden's unrelated hiring is nothing more than a smoke screen.

To further support his claim, Mr. Dammer relied upon *Torre, supra.* In *Torre,* unlike the case at bar, the plaintiff offered far more than subjective, conclusory statements to refute the reasons given for his termination. The plaintiff proffered hard evidence that *inter alia*: when plaintiff's supervisor first took over the department, he sought to replace plaintiff with a younger employee; during his search for a replacement, the supervisor rejected one candidate because he did not want to hire anyone over 35; there was substantial evidence that the supervisor who exhibited age hostility played a key role in plaintiff's transfer and ultimate termination; the position to which plaintiff was transferred immediately prior to his termination was previously eliminated because there were insufficient sales to support the position; and the defendant changed its testimony regarding the alleged reason for the reduction-in-force which resulted in plaintiff's job being eliminated. Based on these documented reasons, among others, the *Torre* court concluded that a reasonable jury might find that the plaintiff's supervisor was biased against plaintiff because of his age, and that this animus resulted in plaintiff's transfer to a dead end job, and ultimately his termination. *Id.* at 834-835.

In the case at bar, there are no facts, documented or otherwise, which rise to the level of proofs in *Torre.* Mr. Dammer argues that an inference can be drawn that Mr. Ruppert had a "premeditated plan" to get rid of older workers and replace them with younger employees. However, the facts, which are undisputed, fail to support Mr. Dammer's claims. For example,

Mr. Dammer was the only employee within the protected class whose position was eliminated during the reorganization of the import department. Two of the positions which were eliminated were vacant at the time of the reorganization. The other position which was eliminated, an import clerk's position, was held by an employee *under* the age of forty. Further, another import clerk who was 53, and thus within the protected class, was retained. Moreover, Mr. Dammer admitted that another employee, Ernest Angelino, the manager of domestic traffic, who also reports to Mr. Ruppert and who is older than Mr. Ruppert, was retained by Mr. Ruppert after the reduction-in-force.[2]

To support his claim of pretext, Mr. Dammer harkens back to Mr. Ruppert's inquiry about his decision regarding early retirement before his option period expired. According to Mr. Dammer, this fact indicates Mr. Ruppert's desire to get rid of him. The record — in particular Mr. Dammer's own testimony — reveals that Mr. Ruppert only questioned Mr. Dammer because he wanted to know if he would have to spend time and money seeking to replace him. It is true that Mr. Ruppert did replace the other employees who opted for early retirement but significantly, one of the new hires was within the protected age group.[3]

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2. The other employees over forty who left MBNA within one year prior to the reduction-in-force were those who elected early retirement. In order for plaintiff's inference to make sense, a jury would have to conclude that MBNA offered early retirement to *all* eligible employees, *company-wide*, just so that Mr. Ruppert could weed out a few older workers in his small department.

3. This further illustrates the flawed logic in petitioner's "inference." If the company-wide early retirement program was subterfuge designed to cover up Mr. Ruppert's desire to weed out older workers in his department, Mr. Ruppert certainly would not have hired a 53 year old (just three years younger than Mr. Dammer and one year *older* than Mr. Ruppert) as a replacement. However, the uncontroverted evidence is that one of the three individuals hired to replace clerks who opted for early retirement was, in fact, 53!

Petitioner argues that an inference can be drawn that at the time early retirement was offered to him (and every other eligible employee company-wide), Mr. Ruppert was already planning to put Mr. Ahlden in his position. This is nonsense. As set forth above, Mr. Ahlden did not replace Mr. Dammer.

Petitioner also attempted to mislead the courts below by arguing that positions were created and filled with younger employees, while his position was eliminated. In support of this contention he points to a memorandum which shows that two clerk positions were "open" on July 25, 1991. In fact, the "open" positions as well as Mr. Dammer's position and another clerk position were all eliminated at the time of the work force reduction. There were no positions filled at the time that Mr. Dammer's position was eliminated because there were no open positions.

Finally, Mr. Dammer has consistently overlooked one very important fact, Mr. Ruppert neither instituted the early retirement offer nor the work force reduction. Moreover, Mr. Ruppert was not the ultimate decision maker with respect to implementation of MBNA's reduction-in-force. The reduction-in-force was mandated by MBNA's board of directors. The human resource department instructed each department to conduct an analysis. Final approval and eliminations were made by executive management following review and analysis by the human resource department and MBNA's legal department.

Mr. Dammer utterly failed to show any age animus on the part of Mr. Ruppert who himself was well within the protected age group. More importantly, he has not — and cannot — asserted an age animus on the part of those above Mr. Ruppert — *i.e.*, those responsible for implementing the early retirement program and the reduction-in-force. Nor has petitioner shown any evidence which disputes the economic need for MBNA to

down-size its entire workforce. Therefore, petitioner did not met his burden of casting any, let alone substantial, doubt on MBNA's proffered reasons for the elimination of his job. He failed to adduce any facts to support even an inference of "pretext."

CONCLUSION

Accordingly, as matter of law, MBNA was entitled to summary judgment and this Court should not grant Mr. Dammer's Petition which raises questions which are moot because they ignore the careful, complete and correct analyses undertaken by the courts below.

Mr. Dammer does not, by this Petition present any question as to the lower courts' findings regarding his failure to prove pretext. As such, this Court lacks jurisdiction because an opinion on the questions presented will not affect the rights of either party. Summary judgment will stand because it was granted (and upheld) not only because Mr. Dammer failed to establish a *prima facie* case of age discrimination, but also because he could not meet his ultimate burden of proving pretext. Therefore, in this case and as to these parties, any opinion on the questions presented in the subject Petition would be merely advisory. For the foregoing reasons, MBNA respectfully requests that this Court deny Mr. Dammer's Petition For Writ of Certiorari.

Respectfully submitted,

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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

LEO A. DAMMER,

Petitioner,

vs.

MERCEDES-BENZ OF NORTH AMERICA, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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RESPONSE TO STATEMENT OF FACTS AND SUMMARY OF ARGUMENT

Petitioner, Leo Dammer, relies on facts previously submitted, but must address the Statement of Facts and Summary of Mercedes-Benz of North America (MBNA).

Petitioner does not question *per se* the reduction-in-force due a downturn of new car sales. Petitioner was the Import Supervisor for twenty years for the department that provided parts for all years of MBNA automobiles throughout the country and was not involved with selling new cars. MBNA offered no evidence to dispute petitioner's contention that the parts division was not impacted. MBNA evaded the fact that petitioner's duties dealt solely with parts and not the sale of new cars.

MBNA states that petitioner offered "no evidence whatsoever to contradict statistical evidence". But, petitioner claimed intentional disparate treatment and not facially neutral disparate impact requiring a statistical analysis.

MBNA admits that the essential functions of petitioner, Mr. Dammer, were assigned to the remaining employees (some substantially younger) in the parts department. Thus, MBNA admits that there was not a total elimination of petitioner's job. Although petitioner's title was eliminated, petitioner's duties were shifted to younger, less qualified employees.

MBNA characterizes as a "bald assertion" petitioner's claim that a decision had already been made to replace him with Kay-Wohl Ahlden (Ahlden) a 28-year old, much younger male employee, from Germany at the time petitioner was considering the early retirement package. Such a claim is hardly "bald" when MBNA admitted that contemporaneously with the offer of early retirement between August and October 1990, plans were in place to hire Ahlden who was officially hired as a new hire

according to personnel records effective April 1, 1991. Furthermore, between August and October 1990, petitioner was approached more than once before the deadline concerning early retirement. Agents of MBNA admitted that they wanted to replace petitioner if he chose early retirement which would have been effective January 1, 1991. The evidence presented by both parties creates strong inferences that MBNA had Ahlden in mind as petitioner's replacement and MBNA was disappointed that petitioner declined the incentive to retire. Ruppert and Ahlden admitted that there was no paper trail regarding Ahlden's recruitment.

Petitioner's manager and decisionmaker Ernst Ruppert (Ruppert) visibly showed his displeasure when petitioner declined early retirement in October 1990. Then, Ruppert displayed retaliation and created a hostile environment around petitioner causing him great stress by ignoring him, belittling him, subjecting him to unfounded criticism, excluding him from important meetings and information, taking away his main duties and assigning such duties to the new hire, 28-year old Ahlden.

Ahlden, in turn, added to this hostile environment and Ahlden's actions against petitioner were ratified by Ruppert. After Ahlden was hired and continuously thereafter, Ahlden began taking over petitioner's main duties including the important function of visiting different locations around the country where parts were imported. Ahlden would appear in petitioner's work location, ignore petitioner and give orders to petitioner's staff and undermine petitioner in front of his staff. Petitioner complained to Ruppert in vain.

It shocks the conscience how MBNA misrepresented the facts below and continues to do so to this Court by, for example, stating "Mr. Dammer [petitioner] specifically admits that Ahlden was his superior because he [Ahlden] 'ran the

department'." Petitioner was expressing his dismay that Ahlden had usurped petitioner's duties with no explanation, certainly not that Ahlden was petitioner's superior.

The working environment had become so stressful that petitioner felt that MBNA wanted to force him to quit or justify a termination if petitioner could no longer perform under such circumstances. As it turned out, decisionmaker Ruppert used the opportune reduction-in-force as the pretext for the termination.

MBNA shielded Ahlden's true employment history from the EEOC by listing Ahlden with other employees as a regular employee in the United States since 1985 instead of having been hired in 1991, close to the time when petitioner was targeted for termination. The EEOC chose to believe MBNA and did not address the Ahlden issue despite petitioner's affidavit. The EEOC focused on disparate impact based on the statistics provided by MBNA and summarily dismissed petitioner's claim. App. 29a-31a.

MBNA's assertion that petitioner did not know when the reduction-in-force was formulated is irrelevant since petitioner is claiming intentional discrimination and does not question the reduction-in-force due to low new car sales. The uncontradicted evidence proves that Ruppert targeted petitioner for termination in July 1991 not one week prior to termination as MBNA is attempting to convey.

MBNA bases the strength of its case by relying on facts that petitioner:

> Testified that no one tried to influence his decision regarding early retirement; (However, Eric Lenz who approached petitioner because Ruppert was "after him to find out" overly stressed the point that he (Lenz) was not supposed to influence petitioner.)

> No one in his department said anything to him which led him to believe that he would be forced out of the department if he declined early retirement; and
>
> Never heard anyone say anything that led him to believe that his superiors were trying to get rid of him.

Surely, employers are not so direct. This is another effort by MBNA to dictate petitioner's claims as either disparate impact and/or direct evidence of discrimination when this case is about intentional age discrimination based on circumstantial evidence.

As if fatal to petitioner's claim, MBNA asserts that:

> petitioner never complained to MBNA that he was a victim of age discrimination before his termination, or on the date of his termination, or after he was terminated.

Even if true, whether the petitioner did or did not use the actual words, age discrimination, to MBNA is immaterial. In any event, petitioner attempted to utilize the so-called Open Door Communications policy of MBNA and to discuss his concerns to Ruppert about Ahlden's actions but was rebuffed.

Again, MBNA's statements "that Mr. Ahlden did not assume any of Mr. Dammer's job duties" and that Ahlden's position was unrelated to that of petitioner's are absolutely not true. First, Ahlden admitted that in Germany he worked in the ocean freight shipment of parts. Ahlden further admitted that he did visit locations around the country beginning in May 1991. Petitioner for years had the responsibility of visiting these locations. Ahlden admitted that he did perform petitioner's function of dealing with steamship companies, airlines, customs, house brokers, and freight forwarders.

MBNA in contradiction states that Ahlden was a contract employee for a limited time. But, MBNA admitted in the personnel files provided below that Ahlden was hired April 1, 1991 as a "new hire" and "permanent" employee. And, for the EEOC, MBNA listed Ahlden as an employee in the United States since 1985.

MBNA grasps at alleged comments by petitioner as "Ruppert didn't like anyone working for him who was older" so as to trivialize the case. Petitioner did not rely on such impressions.

MBNA resorted to trick questions, as whether petitioner believed a company has the right to reduce staff. No matter what answer was elicited, MBNA was prepared to use the answer against petitioner. The petitioner rightly did believe that the company should have retained him rather than hire and retain younger less qualified employees and shift petitioner's duties to them.

In its summary, MBNA reiterates its statistical analysis of ages of those employees terminated and of those retained as if it were enough to prevail. MBNA asserts that petitioner provided only subjective conclusions. Yet, MBNA itself, *inter alia*, admits that petitioner's duties "were absorbed by the remaining staff" and Ahlden admits he performed petitioner's main duties.

I. THE IMPORTANT QUESTIONS PRESENTED ARE NOT MOOT SINCE THIS COURT'S DECISION WOULD RESULT IN "SPECIFIC RELIEF" TO ONE OF THE PARTIES IN INTEREST.

MBNA tells this Court that it lacks jurisdiction to grant the Petition for Writ of Certiorari because the questions presented

are moot and "the decision of this Court would not affect the rights of the litigants before it". *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S. Ct. 402, 404, 30 L. Ed. 2d 413 (1971). MBNA's argument demonstrates precisely why these questions are not moot. This case is "a real and substantial controversy", an actual case, with real facts that generate questions of national importance for this Court to consider. *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 240-41, 57 S. Ct. 461, 463-64, 81 L. Ed. 617 (1937).

If the courts below had ruled in favor of petitioner *arguendo*, MBNA would still be arguing mootness because the courts had found no *prima facie* case of discrimination.

The Circuit Court using a strict version of the McDonnell Douglas model ruled that petitioner did not create an inference of unlawful discrimination because he "has not demonstrated any new employee was hired to replace him".

In finding that petitioner did not establish a *prima facie* case of discrimination the Circuit Court focused on the date of the termination rather than the competent evidence presented by petitioner beginning from the day he refused early retirement, a year earlier and the age animus to which petitioner was subjected. Petitioner's first question to this Court involves age animus prior to the termination as demonstrated in this case.

In its further analysis, like the district court, the Circuit Court focused on a stray remark "age before beauty" provided by MBNA and ruled that a single comment does not demonstrate direct evidence of discriminatory motive. But, petitioner does not rely on any such comment at all in his case and attempted to convey that to the courts! This comment provided by MBNA trivialized petitioner's case in the eyes of the courts.

MBNA, in attempting to justify to this Court its inclusion of the "age before beauty" comment, contends (as if done in petitioner's favor) "that MBNA raised the issue because it was the *only* circumstantial evidence identified by Mr. Dammer". However, the courts below latched on to this very comment "age before beauty" as petitioner's proffer of direct evidence and made it an important part of their analysis. App. 8a, 23a. Moreover, almost identical opinions below reflect inferences in the light mot favorable to the defendant rather than plaintiff.

Hopefully this Court will find that cumulative evidence of age animus prior to petitioner's termination is sufficient to establish a *prima facie* case and create an inference of age discrimination.

Then, petitioner can proffer competent in-depth evidence connected to the past discriminatory actions to rebut MBNA's reason for the termination. Thus, the lower courts' decisions would rest on the proper merits of the case rather than MBNA's proffer of "age before beauty" and statistics.

II. DESPITE MBNA'S STATISTICS, PETITIONER HAS SHOWN AND MBNA HAS ADMITTED THAT YOUNGER EMPLOYEES WERE RETAINED WHO TOOK OVER PETITIONER'S DUTIES AND CONSTRUCTIVELY REPLACED HIM.

As indicated previously, petitioner does not and has never *per se* questioned MBNA's reduction-in-force due to a downturn in new car sales and sees no relevance to the statistical evidence. Again MBNA is attempting to confuse petitioner's claim of disparate treatment with disparate impact.

MBNA relies on its statistical evidence to show that "employees over 40 faired better than did younger employees"

which petitioner does not dispute. "Numbers are numbers, they speak for themselves," as MBNA asserts.

Moreover, MBNA admits that "both courts below relied upon that uncontroverted statistical evidence in concluding that Mr. Dammer could not establish a *prima facie* case of age discrimination. Petition at App. 7a, 23a.

This proves that the courts did not consider individual disparate treatment which characterizes petitioner's case.

In *Thornbrough v. Columbus and Greenville R. Co.*, 760 F.2d 633, 643 (5th Cir. 1985), in reversing the granting of defendant's motion for summary judgment in a "reduction-in-force case" the Fifth Circuit noted that the plaintiff did not have to rely on any remarks concerning age and did not offer statistical evidence. But, plaintiff offered proof that several younger, allegedly less-qualified employees were retained. The *Thornbrough* court stressed that in a reduction-in-force case that it is not the discharge alone but discharge itself coupled with the retention of younger employees that creates the inference of discrimination.

The fact that petitioner's duties remained but he, the most qualified to do the job, was fired should make this Court wonder. MBNA has admitted that petitioner's duties were absorbed by other younger employees.

As in *Montana v. First Federal S&L of Rochester*, 869 F.2d 100, 105-06 (2nd Cir. 1989) which overturned summary judgment, no options to remain were given to plaintiff whose responsibilities were reassigned to younger employees.

This shifting of duties to younger employees whether during a *bona fide* restructuring or under the pretext of "job elimination" to justify termination of older employees should

not go unnoticed by this Court. Such evidence of shifting of duties could easily fit in the fourth prong of the McDonnell-Douglas *prima facie* case as a constructive replacement by younger employees. MBNA has ignored this shifting in its opposition.

III. PETITIONER THROUGHOUT HIS PETITION HAS CHALLENGED THE FINDINGS OF THE COURTS BELOW IN SUPPORT OF HIS QUESTIONS TO THIS COURT. A SEPARATE QUESTION WAS NOT NECESSARY.

Petitioner has challenged MBNA's version of the facts and the courts' decisions below throughout his petition and reply.

In Issue III, MBNA continues to provide this Court with unsubstantiated and conflicting versions of the facts to prejudice petitioner's case. For example, MBNA is trying to give the impression that the courts below considered the issues now presented. MBNA, again, is attempting to convince this Court that petitioner's claim was based on direct evidence by stating "Mr. Dammer could not point to no direct evidence of discrimination." MBNA relies on petitioner's alleged impressions that Ruppert had a "premeditated plan" to get rid of older workers and replace them with younger employees. Petitioner admits Ruppert had a premeditated plan to replace him with Ahlden before the reduction-in-force.

This Court's review of the opinions below will reveal almost identical opinions based on statistics and disparate impact and the notorious "age before beauty" statement magnanimously proffered by MBNA. The important genuine material facts were not considered by the courts possibly because evidence of the pretermination age animus and/or shifting of duties to establish a *prima facie* case is not established law in the Third Circuit.

The *prima facie* case must be resolved first in the context of the Questions Presented before any pretext analysis.

Petitioner believes that the confusion and conflicts in the Circuits regarding *prima facie* cases will be lessened and qualified older workers will be better protected under the ADEA if this Court grants this Writ of Certiorari.

CONCLUSION

For the reasons set forth herein and in the Petition for Writ of Certiorari, this Court should grant the Petition and set aside the decision of the Third Circuit.

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